



OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
— for —
British Columbia

Order 04-15

UNIVERSITY OF BRITISH COLUMBIA

Celia Francis, Adjudicator
June 30, 2004

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Summary: Applicant requested records related to his employment and promotion within UBC. UBC disclosed many records, withheld other records and information under ss. 13(1), 14 and 22 and said other records were not relevant to the request. Applicant questioned search adequacy and objected to withholding of information. UBC applied s. 14 properly and, with some exceptions, also ss. 13(1) and 22. UBC searched adequately for responsive records, with one minor exception, for which it was ordered to search again. UBC ordered to disclose some information withheld under ss. 13(1) and 22 and to provide a response on some records found to be relevant to request.

Key Words: duty to assist – respond openly, accurately and completely – adequacy of search – every reasonable effort – advice or recommendations – solicitor client privilege – records containing third party personal information – unreasonable invasion of personal privacy.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 6, 13(1), 14, 22(1), 22(2)(f) and 22(3)(d).

Authorities Considered: B.C.: Order 00-08, [2000] B.C.I.P.C.D. No. 8; Order 01-07, [2001] B.C.I.P.C.D. No. 7; Order 01-53, [2001] B.C.I.P.C.D. No. 56; Order 03-24, [2003] B.C.I.P.C.D. No. 24; Order 03-37, [2003] B.C.I.P.C.D. No. 37.

Cases Considered: *College of Physicians and Surgeons of BC v. British Columbia (Information and Privacy Commissioner)* [2002] B.C.J. No. 2779, 2002 BCCA 665.

1.0 INTRODUCTION

[1] In June 2002, the applicant requested from the University of British Columbia (“UBC”) files relating to his employment in various offices at UBC, as well as any records related to his tenure and promotion at any level of UBC. UBC responded in September 2002, informing the applicant that it had located almost 2,800 pages of records. It provided the applicant with copies of records and also told the applicant that it was denying access to some information and records under ss. 13(1), 14 and 22(1), 22(2)(f) and 22(3)(d) and (h) of the *Freedom of Information and Protection of Privacy Act* (“Act”). It also said that it was not providing some information and records as they were irrelevant to (outside the scope of) the applicant’s request. UBC provided tables listing the locations in which it had found records, the exceptions it had applied to the records, by page number, and the pages that, according to UBC, contained irrelevant information.

[2] The applicant requested a review of UBC’s decision the following month. He mentioned a report by a named “fact finder” which he had not received. He also questioned UBC’s decision to withhold some of the material as excepted or as irrelevant to his request.

[3] It appears from the fact report that, during mediation, the applicant raised issues to do with UBC’s compliance with its duty under s. 6(1) of the Act to assist him and to conduct an adequate search for the requested records. These are both listed as issues in the inquiry notice and fact report, although the parties deal only with the search issue in their submissions.

[4] According to the portfolio officer’s fact report that accompanied the notice for this inquiry, the applicant agreed during mediation that a number of specified pages were “removed from the review”. That is, the applicant said he was not interested in obtaining complete copies of the specified records. The severed information in these cases relates primarily to the names and other identifying information of referees. In a few cases, the withheld information relates to the employment history of other people. Accordingly, I have not dealt in this decision with the following records, as listed in the fact report: pp. 848, 1187-1191, 1229, 1231-1232, 1259-1272, 1286-1289, 1291, 1343-1356, 1615, 1620, 2233, 2246, 2300-2305, 2308, 2316-2348, 2458-2462, 2501-2525, 2572-2576, 2577-2584 and 2585-2615.

[5] Because the matter did not settle in mediation, a written inquiry was held under Part 5 of the Act. I have dealt with this inquiry, by making all findings of fact and law and the necessary order under s. 58, as the delegate of the Information and Privacy Commissioner under s. 49(1) of the Act.

[6] UBC said in its initial submission that it had decided to disclose two copies of the fact finder’s report and a page of notes to the applicant. Thus records 136-238, 862-961 and 1900 are also no longer in issue. It is not clear why UBC waited until the inquiry to disclose these records. It would have been preferable for UBC to have disclosed them sooner, thereby saving the applicant the effort of preparing an argument on the report.

2.0 ISSUE

[7] The issues before me in this case are:

1. Is UBC required by s. 22 to refuse access to information?
2. Is UBC authorized by ss. 13(1) and 14 to refuse access to information?
3. Has UBC complied with its duty under s. 6(1) to assist the applicant and to respond openly, accurately and completely, including by conducting an adequate search for the requested records?

[8] Under s. 57(1) of the Act, UBC has the burden of proof regarding ss. 13(1) and 14 while, under s. 57(2), the applicant has the burden of proof regarding third-party personal information.

3.0 DISCUSSION

[9] **3.1 Advice and Recommendations** – UBC said that it applied s. 13(1) to portions of some records and to several others in their entirety. Section 13(1) says:

13(1) The head of a public body may refuse to disclose to an applicant information that would reveal advice or recommendations developed by or for a public body or a minister.

[10] UBC said that these records fall within the scope of s. 13(1) of the Act and that s. 14 also applies to some of them. It said nothing more on how it believes s. 13(1) applies. It did not, for example, point me to portions of the records which it believes would reveal implicit or explicit advice or recommendations.

[11] It is not enough for a public body simply to assert that an exception applies. It must support its position with argument and evidence. It must show how disclosure of the information would reveal, as in the case of s. 13(1), advice or recommendations. UBC did none of these things.

[12] In his reply, the applicant criticized UBC for what he termed an overly-broad application and extreme interpretation of s. 13(1). He questioned whether communications between administrative employees can contain advice or recommendations within the meaning of s. 13(1). He asked whether there can be any confidentiality in advice which has been spread around UBC and suggested that UBC has breached its own deliberative secrecy. He provided no support for this latter assertion.

[13] UBC applied s. 13(1) to some information and records to which it also applied s. 14. I find below that s. 14 applies to the withheld information or records as follows: pp. 281, 390, 490, 590, 709, 711-712, 730, 731, 733, 1733, 1861, 1883-1891, 1955, 1996 and 2727. I therefore do not need to consider if s. 13(1) also applies to the same information and records.

[14] Despite UBC's limited submissions on s. 13(1), I am able to tell from their face that some items to which UBC applied s. 13(1) (portions of pp. 2741-2 and 2747-8) consist of advice and recommendations to UBC staff.

[15] Pages 2741-2 and 2747-8 appear to be draft letters with suggested wording changes. Apart from the changes, the letters are identical to the final versions, which appear among the disclosed records. As I noted at para. 59 of Order 03-37, [2003] B.C.I.P.C.D. No. 37, the Information and Privacy Commissioner has said that s. 13(1) does not apply to drafts simply because they are drafts. I have already said that UBC did not explain how it considers that s. 13(1) applies in this case and, except for the suggested changes, I am unable to identify any information in these pages that constitutes advice or recommendations. I find that s. 13(1) applies only to those portions in pp. 2741-2 and 2747-8 that relate to recommended changes to the wording of the letters, as shown in the copies of these records I have severed for UBC to disclose to the applicant.

[16] UBC also applied s. 13(1) to a number of records in which I could identify no implicit or explicit advice or recommendations, as follows: pp. 1285, 1469-1472 and 1859. I find that s. 13(1) does not apply to these records.

[17] **3.2 Solicitor Client Privilege** – UBC said that it withheld or severed a number of records under s. 14. Section 14 allows public bodies to withhold information that is protected by solicitor client privilege. The Information and Privacy Commissioner has considered the application of s. 14 in numerous orders and the principles for its application are well-established. See, for example, Order 00-08, [2000] B.C.I.P.C.D. No. 8. I will not repeat those principles, but will apply them here.

[18] The applicant conceded that communications between UBC and its counsel might fall under solicitor client privilege but doubted that s. 14 applies to as much material as UBC withheld. He said he was assured by UBC that the fact finder, although a lawyer, was not acting as a lawyer in her work as fact finder for UBC. He said he was told that she was hired only to gather information and create a report of the facts to UBC. He said that, while a UBC employee later told him that the fact finder was also giving legal advice, the fact finder was never identified to him as UBC's legal counsel and, he said, was not authorized to act on legal instructions from UBC. In support of his arguments on this point, the applicant provided copies of a number of letters and e-mails.

[19] The applicant argued that there is no solicitor client privilege inherent in the records of communications withheld under s. 14 and that any correspondence with the fact finder should therefore be released. He also raised the issue of whether UBC had waived privilege in its subsequent actions in circulating the report to the UBC Faculty Association. Of course, UBC has since disclosed the fact finder's report to the applicant and I need not consider whether s. 14 applies to it.

[20] UBC said that it had withheld some pages because they would reveal communications between UBC and its external legal counsel or other legal advice. It said that it withheld still others that relate to communications with the fact finder who, it argues, was acting in her capacity as a lawyer when she conducted her investigation of the applicant. The last two items in

her terms of reference, it said, “clearly included legal advice to UBC”. UBC referred to paras. 21-42 in *College of Physicians and Surgeons of BC v. British Columbia (Information and Privacy Commissioner)* [2002] B.C.J. No. 2779, 2002 BCCA 665, in support of this argument. UBC said that, although the report was provided to the Faculty Association for discussion with the applicant, it has not waived privilege over its communications with the fact finder.

[21] UBC said at para. 18 of its initial submission that the fact finder was provided with the following terms of reference for her investigation:

- (a) determine the facts related to UBC’s response to [the applicant’s] complaint to date;
- (b) determine whether [the applicant’s] issues related to University Policy No. 85, or any other University policy;
- (c) determine whether the University has responded to [the applicant’s] complaint appropriately and with regard to due process.

[22] In Order 03-37, which also involved UBC, I remarked that UBC had provided little in the way of argument or evidence to support its position that s. 14 applied. I noted that the Information and Privacy Commissioner had said in Order 03-24, [2003] B.C.I.P.C.D. No. 24, that the s. 57(1) burden has meaning and that a party that asserts solicitor client privilege must prove that it exists. I said I did not consider UBC to have done so there, although I was able to determine from the records themselves that s. 14 applied in that case.

[23] Beyond what I have set out above, UBC provided no argument or evidence to support its s. 14 arguments in this case either. It did not, for example, provide affidavit evidence from UBC staff, its legal counsel, the fact finder or others who might be in a position to depose to the existence of the solicitor client relationship. Once again, I do not consider that UBC has proved that solicitor client privilege exists in this case. Its submissions on this point were not at all helpful.

[24] After a careful review of the records to which UBC applied s. 14, as well as a consideration of the context in which they came into existence, however, I am satisfied that they all relate to the giving, seeking or formulating of legal advice. The records involving communications between UBC and its in-house and external legal counsel speak for themselves. The records involving the fact finder indicate that UBC retained her to provide it with legal advice over an extended period of time, not only to carry out an investigation of the applicant’s complaint. In my view, solicitor client privilege applies to all of the withheld or severed records of communications between UBC and its in-house and external legal counsel, as listed in the table UBC provided to the applicant with its decision letter. I find that s. 14 applies to them.

[25] **3.3 Personal Privacy** – UBC said that it applied ss. 22(1) and 22(3)(d) to information related to third parties’ employment (pp. 723, 732, 1447, 1860 and 2161). It also said it had applied ss. 22(1) and 22(2)(f) to personal information supplied in confidence (p. 2114). UBC did not explain why it believes these sections apply.

[26] The applicant generally questioned the removal of third-party names and suggested that they might be relevant to his request. He said that the personal information withheld under s. 22

was relevant to a fair determination of his rights. He alleged that he has suffered “bizarre and twisted” abuse by UBC employees at several levels and that his “person, career, profession, and employment have been attacked in several regards”. He claims that UBC employees lied at hearings held to address his concerns. In making these arguments, I take the applicant to refer to the circumstance in s. 22(2)(c).

[27] The Information and Privacy Commissioner has discussed the application of s. 22 in a number of orders, for example, Order 01-53, [2001] B.C.I.P.C.D. No. 56. I will not repeat that discussion but have applied the same principles here.

[28] I reproduce below the relevant parts of s. 22:

22(1) The head of a public body must refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party’s personal privacy.

(2) In determining under subsection (1) or (3) whether a disclosure of personal information constitutes an unreasonable invasion of a third party’s personal privacy, the head of a public body must consider all the relevant circumstances, including whether

...

(c) the personal information is relevant to a fair determination of the applicant’s rights,

...

(f) the personal information has been supplied in confidence,

...

(3) A disclosure of personal information is presumed to be an unreasonable invasion of a third party’s personal privacy if

...

(d) the personal information relates to employment, occupational or educational history,

....

Employment history

[29] Most of the records to which UBC originally applied s. 22 are no longer in issue here, as the applicant agreed during mediation not to pursue them. As for the remaining records, I agree with UBC that the withheld information on pp. 723, 732, 1447, 1860 and 2161 (principally the names of other people) is, in the context of their appearance in these records, the employment history information of those people and falls under s. 22(3)(d).

[30] There is, however, one record, p. 2114, which UBC withheld under s. 22 but to which s. 22 does not apply in its entirety, in my view. Page 2114 consists of someone’s handwritten notes which mention the applicant and others and contains a few words of employment history information about another person which fall under s. 22(3)(d). However, p. 2114 also appears to recount events and conversations involving the applicant. This record therefore contains the

applicant's own personal information, to which s. 22 does not apply here, and to which he is entitled, I will say here, in light of all relevant circumstances.

Relevant circumstances

[31] I will now turn to a consideration of the relevant circumstances. The applicant argues that the withheld information is relevant to his rights. He does not, however, explain what rights are at stake nor how the minimal amounts of withheld personal information in question might be relevant to those rights. The applicant's general assertions that he has been "abused" in his dealings with UBC do not suffice to support a finding that s. 22(2)(c) applies here. The Information and Privacy Commissioner has found in past orders that "rights" for the purposes of this section are "legal rights" (see, for example, Order 01-07, [2001] B.C.I.P.C.D. No. 7). While it is obvious from the records that the applicant has been engaged in grievances involving UBC, as well as litigation of some kind, it is not clear how the small amounts of withheld personal information might be relevant to any legal rights the applicant may have in those processes, if they were still underway at the time of his request. I find that s. 22(2)(c) is not relevant here.

[32] UBC did not argue that any relevant circumstances apply to pp. 723, 732, 1447, 1860 and 2161 and none is obvious to me. However, UBC did argue that s. 22(2)(f) applies to p. 2114 as the personal information in the record was supplied in confidence. UBC did not provide any argument or evidence to support its position on confidential supply, for example, by explaining whose notes p. 2114 contains, the context in which the notes were written, who supplied the personal information in the notes and the conditions under which that person supplied it. The record itself also does not provide any support for a s. 22(2)(f) argument. I am unable to conclude from the material before me that s. 22(2)(f) is a relevant circumstance regarding p. 2114 and I find that it does not apply to this record.

Conclusion

[33] To summarize, the applicant is not entitled to any of the personal information that UBC withheld under s. 22 in pp. 723, 732, 1447, 1860 and 2161. He is entitled to his own personal information in p. 2114 but is not entitled to third-party personal information on this page. I have prepared a severed copy of p. 2114 for UBC to disclose to the applicant.

[34] **3.4 Duty to Assist** – The applicant raised issues respecting UBC's compliance with its duty to assist the applicant under s. 6(1) of the Act, mainly regarding its search for records, and I consider this issue below. I also considered his objections to UBC's characterization of certain information and records as not relevant to the request. Although the issue of UBC's general compliance with its duty to respond openly, accurately and completely is listed separately from its duty to search adequately for records, neither party presented arguments on this general issue and I have therefore not considered it.

[35] Section 6(1) reads as follows:

6(1) The head of a public body must make every reasonable effort to assist applicants and to respond without delay to each applicant openly, accurately and completely.

Adequacy of search

[36] The applicant's complaint regarding UBC's search centred around documents created by several named UBC employees, which he said were missing or fewer in number than he expected. He does not develop this theme, however, in his submissions.

[37] UBC provided detailed affidavits from its information and privacy co-ordinator in which she explained her search, including the employees whom she had approached and the areas in which they work. She said she had spent about 160 hours processing this request and knew of no other locations in which documents might be found. In a second affidavit, she also deposed to specific items that the applicant raised in his initial submission.

[38] The applicant objected to UBC's submission of affidavit evidence with its reply, arguing that this office's inquiry instructions state that reply submissions should not raise new issues nor include new evidence, including affidavits. As the affidavit evidence that UBC included with its reply simply responded to the applicant's concerns and did not raise new issues, I decided to consider it.

[39] I do not propose to reproduce the comprehensive affidavit evidence on this issue. I have considered it carefully, however, and have also reviewed the records extensively. I find that, with one minor exception, which the applicant drew to my attention on p. 1 of his initial submission, UBC has complied with its s. 6(1) duty to search for responsive records and has also accounted satisfactorily for this search. The exception relates to pp. 1446-1447, a string of e-mail messages which stops abruptly in the middle of a message at the bottom of p. 1447. UBC did not address the missing page or pages in its reply and did not otherwise account for their absence. In this one minor area, therefore, I find that UBC did not comply with its s. 6(1) duty and must search for the rest of this record.

Records not relevant to request

[40] UBC said that some information and records were not relevant to the applicant's request and it withheld these items, although it did not explain why it did not view these items as relevant. Where UBC severed or withheld pages for this reason, it marked them as "N/R" and also listed them as such in the tables of withheld and severed records. The applicant voiced suspicions of UBC's characterization of these items as not relevant to his request and suggested that UBC was withholding them contrary to the Act.

[41] My review of the records and information considered to be non-responsive to the applicant's request shows that most relate to people or topics other than the applicant. With some exceptions, therefore, I agree with UBC's decision to classify certain records or portions of records as outside the scope of the applicant's request.

[42] The exceptions are pp. 711, 1937 and 2050-2056. In the case of p. 711, it is not clear to me why UBC found some information in this record not to be relevant. However, I find elsewhere in this decision that s. 14 applies to all of p. 711.

[43] With respect to p. 1937, someone's handwritten notes, although the applicant's name is not mentioned, I recognize what appear to be phrases from a draft letter to him. In pp. 2050-2056, someone's handwritten notes, I note references to the applicant's name here and there, as well as some remarks which appear to be about the applicant. It is thus not clear why UBC considered pp. 1937 and 2050-2056 to be outside the scope of the applicant's request. UBC must, in my view, re-examine these pages with a view to making a decision under the Act as to whether or not it will release them to the applicant.

4.0 CONCLUSION

[44] For reasons given above, I make the following orders under s. 58 of the Act:

1. I confirm that UBC is authorized to refuse access to the information and records it withheld under s. 14 of the Act.
2. Subject to para. 3 below, I require UBC to give the applicant access to information it withheld under s. 13(1) in portions of pp. 2741-2 and 2747-8 and to all of pp. 1285, 1469-1472 and 1859.
3. I confirm that UBC is authorized by s. 13(1) of the Act to refuse access to the highlighted portions of pp. 2741-2 and 2747-8, copies of which I provide to UBC with its copy of this order.
4. Subject to para. 5 below, I require UBC to withhold the information it withheld under s. 22 in pp. 723, 732, 1447, 1860, 2114 and 2161.
5. I require UBC to give the applicant access to his own personal information on p. 2114, as shown in the severed copy provided to UBC with this order.
6. I order UBC to perform its duty to respond to the applicant's request by processing pp. 1937 and 2050-2056 under the Act and to provide the applicant with its written decision on whether or not the applicant is entitled to access, copied to me.
7. I order UBC to search for the rest of the record which begins on pp. 1446-1447 and to account for the results of this search in a letter to the applicant, a copy of which it is to send to me.

June 30, 2004

ORIGINAL SIGNED BY

Celia Francis
Adjudicator